Supreme Court, U.S.
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80-870

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DENNIS PERRY JR.,

PETITIONER,

vs.

PEOPLE OF THE STATE
OF ILLINOIS,

RESPONDENT.

ON
PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF ILLINOIS.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Did the warrantless search of the automobile which Petitioner drove on the afternoon of his arrest violate his 4th Amendment rights:

(A) When the police had 7-1/2 hours to obtain a search warrant for the car between the time a description of the car was given to them and the time the car was stopped.

(B) In the absence of reasonable grounds to believe that a car contains stolen goods, contraband or evidence may that car be searched.

(C) When the police see students loading things into a car beside a college

dormatory and none of the things loaded are identified as proceeds from a burglary which occurred 15 hours earlier does the fact that the car looked like the car seen at the burglary give the officers reasonable grounds to believe that the person driving the car away from the dormatory was a burglar.

(D) When the warrantless search of an automobile is sought to be justified as a search incident to an arrest but the search occurs after the Petitioner is locked in the police station.

(E) When the warrantless search

> of an automobile is sought to be justified as an "inventory" search but the apparent purpose of the search was to look for evidence in a burglary investigation and the state failed to prove that the search was a part of any routine forfeiture or property protecting procedure.

(2) When the Petitioner, a student from Illinois State University, challenged the Array from which his jury was selected on the grounds that the jury pool contained no students (although students make up a third of the population of Bloomington-Normal Illinois [the city where trial was held])and when he offered to prove that students were significantly under-

represented in the Array, was the fact that the Motion and Offer of Proof were oral rather than written, an adequate state ground for denying Petitioner a hearing on his claimed violation of the Sixth and 14th Amendment rights to a jury chosen from a fair cross section of the community.

THE PARTIES

The Petitioner Dennis Perry was Petitioner in the Supreme Court of Illinois, Appellant in the Illinois Appellant Court, Fourth District and Defendant in the Circuit Court of McLean County, Illinois.

The Respondent, People of the State of Illinois, was Respondent in the Supreme Court of Illinois, Appellee in the Illinois Appellant Court, Fourth District, and Plaintiff in the Circuit Court of McLean County. There were no other parties in the proceedings in any of the lower courts.

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DECISIONS BELOW

The Illinois Supreme Court's denial of Leave to Appeal on September 29, 1980 is unreported. (A copy of the denial is found in the Appendix on Page A1).

The decision of the Appellate Court of Illinois is reported People v. Perry 81 Ill. App. 3rd 422, 37 Ill. Dec. 170, 401 NE2d 1263 (4 th Dist. 1980).

JURISDICTIONAL STATEMENT

The Judgment of the Supreme Court of Illinois denying leave to appeal was entered September 29, 1980. The time of day when it was entered on the 29th cannot be ascertained from the record. No rehearing of the denial of leave to appeal was sought and this Petition for Certiorari will be timely if filed by mail on or before November 28, 1980

without an extension. The Petitioner invokes this court's jurisdiction under 28 USC §1257(3) and petitions for a Writ of Certiorari to the Supreme Court of Illinois.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

4th Amendment to the Constitution of the United States

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation and particularly describes the place to be searched, and the persons or things to be seized.

6th Amendment to the
Constitution of the United States

In all criminal prosecutions, the Accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

§1,14th Amendment to the
Constitution of the United States

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ill. Rev. Stat. ch38 §114-3(b):

Motion to Discharge Jury Panel.

(a) Any objection to the manner in which a jury panel has been selected or drawn shall be raised by a motion to discharge the jury panel prior to the voir dire examination. For good cause shown the court may entertain the motion after the voir dire has begun but such motion shall not be heard after a jury has been sworn to hear the cause.

(b) The motion shall be in writing and shall state facts which show that

the jury panel was improperly selected or drawn.

(c) If the motion states facts which show that the jury panel has been improperly selected or drawn it shall be the duty of the court to conduct a hearing. The burden of proving that the jury panel was improperly selected or drawn shall be upon the movant.

(d) If the court finds that the jury panel was improperly selected or drawn the court shall order the jury panel discharged and the selection or drawing of a new panel in the manner provided by law.

Ill. Rev. Stat. ch78 §1

The county board of each county, except those counties which have jury commissioners as provided in "An Act in relation to jury commissioners and authorizing judges to appoint such jury commissioners and to make rules concerning their powers and duties", approved June 15,1887, as amended, shall at or before the time of its meeting, in September, in each year, or at any time thereafter, when necessary for the purpose of this Act, make a list of sufficient number, not less than one-tenth of the legal voters of each town or precinct in the county, giving the place of residence of each name on the list, to be known as a jury list. The list shall be made by choosing every tenth name, or other whole number rate necessary to obtain

the number required, from the latest voter registration lists of all the towns or precincts in the county. The lists of the several towns or precincts shall be arranged alphabetically or numerically, as the case may be, and the count of names shall run continuously rather than starting over with each town or precinct.

STATEMENT OF THE CASE

At a hearing on Petitioner's pre-trial written Motion to Surpress, physical evidence the state conceeded that the Petitioner was arrested without a search or arrest warrant (R.P. 6-7). The arresting officers did not see the Petitioner violate any law (R.P. 29,48). On December 18, 1978 at about 9:00 a.m. Martin Beltz reported to police that at 1:00 a.m. that morning he had seen a black-over-yellow Buick partially blocking his driveway. (R.P. 11). A burglary and home invasion had occurred in the house next to Beltz at about 1:00 a.m. The description of the car given by Beltz was posted on the police bulletin board (R.P. 64) and broadcasted over police radio (R.P. 13) but no search warrant was obtained (R.P. 6-7).

About 4:25 p.m. on the 18th, Officer Silvey found a black-over-yellow Buick corresponding to Beltz's description parked by an Illinois State University dormatory. (R.P.22). Silvey reported his discovery on the police radio (R.P. 22). He watched the car for about 20 minutes while one black man and three black men or women loaded the car (R.P.23). Although Silvey saw the individuals bring things to the car on wheeled carts - carts used by students to take things to and from dormatory rooms (R.P.24) - he could not tell what items were loaded on the cart (R.P.24). Silvey did not claim to have seen any stolen goods loaded into the car (R.P. 23-25).

In response to Silvey's radio report, Detective Keim and Lieutenant Kemp drove to the dormatory and watched the parked

car for 15 minutes (R.P.42). Keim and Kemp watched two or three individuals load objects into the trunk and front seat of the car, but could not see exactly what they were loading (R.P.42).

Eventually the car drove away from the dormatory (R.P.42). The police then stopped the car and arrested the two occupants (R.P.43). The Petitioner and Maxine Moise were patted down (R.P. 43). Petitioner was arrested about 14 hours after the crime was reported (R.P.54). The police checked the interior of the car and noticed stereo equipment and speakers in the car, and a lot of things including a refrigerator and book stand in the open trunk (R.P.43). The police did not then notice it was a Pioneer stereo (R.P.49) and could not tell the serial

number or model (R.P.49). The Petitioner told the police that he had borrowed the car, but that they could move it (R.P. 43).

The Petitioner and Moise were placed in Detective Keim's car, then Officer Kearney drove the Buick to the police station (R.P.58).

After the car was behind the police station, Lieutenant Kemp, Detective Keim and Officer Hood recovered an amplifier from the front seat of the vehicle (R.P.58). During the search of the car at the police station, the officers determined the model number of the stereo (R.P.50). Kemp found a Pioneer amplifier on the front seat of the vehicle next to the driver's seat (R.P.44). Kemp read the serial and model number to Detective Keim (R.P.44).

Keim saw that the serial number and model number matched the numbers of the stolen amplifier shown on the police report (R.P. 44-45).

No warrant was obtained to search the car after the Petitioner was arrested and before the car was searched in the police parking lot.

When confronted with the information that a stolen stereo had been found in the car, the Petitioner executed a consent to search his dormatory room. However, no consent was obtained for the search of the car.

The federal constitution challenge to the search was made in the written pretrial Motion to Suppress, at the hearing on the Motion to Suppress (R.P. 6-88).,when the items seized were offered in evidence (R.P. 371).,by a

written post trial Motion, on appeal in the Appellate Court and by petition for leave to appeal to the Supreme Court of Illinois.

The trial court denied the Motion to Suppress (R.P. 87-88), admitted the items over objection (R.P. 371), and denied the Motion for New Trial (Report of Sentencing Hearing 20-21). The Appellate Court rejected Petitioner's Fourth Amendment attack on the seizure 401 NE2nd at 1269. The Illinois Supreme Court denied leave to appeal.

Immediately before the selection of the jury, the Petitioner challenged the array of the pool from which the jury was selected (R.P. 99-100). The Petitioner asserted that from the face of the jury list it appeared that Illinois State University students had

been excluded from the array (R.P.99). The Petitioner offered to prove the exclusion by testimony (R.P.100). The trial Judge denied the motion on the grounds that it was oral rather than written (R.P.100). The Defendant filed a written and verified Post Trial Motion alleging in part:

> "The purposeful refusal of the Clerk of the Court not to use student registration lists from Illinois State University in creating the pool from which venires are called, the failure of the array to include any students, the failure to include any students among prospective jurors or jurors chosen the overruling of Defendant's challenge to the array without

hearing evidence, deprived the Defendant of jury pools which reasonably represented the community, and deprived the Defendant of his rights under the Sixth and Fourteenth Amendments to the United States Constitution to a petit jury selected from a fair cross-section of the community. DUREN v. MISSOURI - U.S.-58 Led 2d 579, 99 S.Ct-(January 9, 1979). TAYLOR v. LOUISIANA 419 U.S. 522 (1975). Bloomington-Normal has a population of about 71,000 people. Illinois State University at Normal has an enrollment between 17,000 and 20,000 students. The student population makes up a sign-

ificant and distinct group within the population of McLean County. The students population is younger and contains more blacks than the population of the County as a whole. On the face of the jury lists, it was apparent that students from Illinois State University had not been included in the group of prospective jurors. The Court erred in denying Defendant's challenge to the array (R.P. 99,100). The prospective jurors examined contained no students (R.P. 102, 195). Chapter 78 §1, Ill. Rev. Stat. (1977) is unconstitutional as applied to McLean County where the intentional use of voter lists purposefully excludes the overwhelming

majority of the students at Illinois State University. The Court should require a new trial by a jury selected from potential jurors which include a fair cross-section of the community (including Illinois State University students), and should order the hearing of evidence in support of Defendant's challenge to array."

The Post Trial Motion was denied. (Report on Sentencing Hearing At p.20-21). The Appellate Court rejected the Petitioner's 6th and 14th Amendment challenge to the jury array on the grounds that it was oral not written 401 NE2d at 1269. The Supreme Court of Illinois denied leave to appeal.

ARGUMENT

I.

The Petitioner has no place else to turn for protection of his 4th Amendment rights. Ever since STONE v. POWELL 428 U.S. 465 Certiorari, not habeas corpus, is his last chance to vindicate a 4th Amendment claim. Concurring opinion of Mr. Justice Marshall and Breman MINCEY v. ARIZONA 437 US 385 at 402.

Last term this court reaffirmed the automobile operator's justified expectation of privacy and held that people are not shorn 4th Amendment protection when they step into their automobiles DELAWARE v. PROUSE 440 U.S. 648, 662-663.

In COOLIDGE v. NEW HAMPSHIRE 403 U.S. 443 at 454-455 this court held that the search of an automobile requires a warrant unless the state establishes that one of the well defined jealously and carefully drawn exceptions to the warrant requirement applies. The following sections of argument discuss those exceptions.

(A)

One exception frequently applied to automobiles is the CARROL v. UNITED STATES 267 U.S.-132 exigent circumstances exception for fast moving automobiles. The notion is that the car will drive away before a judicial officer can be found to issue a warrant. In COOLIDGE 403 at 463-462 the court found that the car was not in danger of being moved and declined to apply the exigent circumstances exception. The more time that elapses between the time the police learn facts which prompt the seizure and the seizure itself, the less force the exigent circumstances argument keeps. This court has not but ought to decide how long may the police rely on exigent circumstances be-

fore they must obtain a warrant? In the present case at 9:00 a.m., the neighbor next to the home burgl zed provided the police with the des.ription of a black-over-yellow Buick which he had seen partially blocking his driveway at 1:00 a.m. The home invasion had occurred at 1:00 a.m. Once the police had the description of the car from Beltz, they broadcasted it on the police radio and posted it on the police bulletin board, but never sought and never obtained a search warrant for the car. A car which looked like the car seen by Beltz was observed at 3:00 p.m. and stopped after 4:00 p.m. During the more than seven hours from the time of Beltz's call until the stop, the police had ample time to obtain a warrant. The exigent circumstance doctrine may not

justify such a failure to get a warrant. COOLIDGE v. NEW HAMPSHIRE 403 US 443, 458 - 462, see PAYTON v. NEW YORK - U.S. - 63 Led 2d 639 at 648-649.

(B)

Even where exigent circumstances exist, the police must have probable cause to believe that the contents of the automobile offend against the law. CHAMBERS v. MARONEY 399 US 42 at 48-49, DYKE v. TAYLOR IMPLEMENT MFG.CO. 319 U.S. 216 at 221-111. In the present case there was no reasonable grounds to believe that the car contained proceeds from the burglary at the time it was stopped. The car was stopped more than 14 hours after the crime. On the afternoon when it was stopped, the police watched students put things into the car, but the police did not recognize any of the items being loaded as

proceeds from the burglary. In UNITED STATES v. DE RE 332 U.S. 581 the court observed "we are not convinced that a person by mere presence in a suspected car looses immunities from search of his person ....." By analogy when the car is suspect but there is no reason to suspect its contents, a search should not proceed without a warrant. c.f. YBARRA v. ILLINOIS - U.S. -, 62 Led 2d 238 at 245-246. This court has not squarely confronted the situation where the car is suspect, but the officers have no reason to believe that any of its contents are stolen. This case presents that opportunity.

(C)

The Illinois Appellate Court attempted to finesse the other search

and seizure issues presented by the record holding that the Petitioner's arrest was supported by probable cause. A warrantless arrest by police is a violation of the 4th Amendment unless they have reasonably trustworthy information to warrant a prudent man in believing that the Petitioner had committed or was committing an offense BECK v. OHIO 379 U.S.-89 at 91. The arresting officers admitted that they did not see the Petitioner violate any law. The sole facts relied on by the Appellate Court to uphold probable cause where: "Fifteen hours later, a car fitting the description was seen parked on the south side of an ISU dormatory. An officer observed three young men loading items into the automobile." PEOPLE v. PERRY

81 Ill App 3d 422, 37 Ill. Dec 170, 401 NE2d 1263 at 1269. When the police see students loading things into a car beside a college dormatory, and none of the things loaded are identified as proceeds from a burglary which occurred 15 hours earlier, the fact that the car looked like the car seen at the burglary does not give the police reasonable grounds to believe that the person driving the car away from the dormatory was a burglar. The state failed to prove that the arresting officers had sufficient knowledge of facts concerning the Petitioner to support his arrest. If the arrest was without probable cause, then a fruits of search incident to that arrest or occurring because of the arrest must be suppressed. BECK

v. OHIO 379 U.S. 89. While the lower court decision pays lip service to the standards adopted by this court, the substance of the decision is contrary to the probable cause requirement and warrants review by this court.

(D)

Even if we assume that the Appellate Court's holding that probable cause existed was correct, the search complained of was not "incident" to the arrest. As this court said in PRESTON v. UNITED STATES 376 U.S. 364, 367, "Once an accused is under arrest and in custody, then a search made at another place, without a warrant is simply not incident to the arrest." This doctrine was reaffirmed in UNITED STATES v. CHADWICK 433 U.S. 1 where the court held that the later search of a footlocker taken from

the trunk of a car but not opened until the arrestees were in jail could not be justified as incident to the arrest. The justification for a warrantless search of the area in the immediate control of the arrestee is to see that there are no weapons or destructable evidence near the person just arrested. 433 U.S. at 14-15. Those justifications disappear when the police have moved the automobile to a secure location in the police parking lot, and when the Petitioner is locked-up with no access to the vehicle. Just as in ARKANSAS v. SANDERS 442 U.S. 753 once the luggage to be searched is securely in police control, a search warrant should be required once the car is secure. No excuse for omitting to obtain a warrant

exists 442 U.S. at 763, 765. Some members of the court have suggested that the warrant needed before luggage from an automobile is searched does not involve the "automobile" exceptions to the requirement for a warrant. See concurring opinion of Chief Justice Burger in ARKANSAS v. SANDERS 442 U.S. at 766,768. A careful analysis of CHAMBERS v. MARONY 399 U.S. 42 does not create an "automobile" exception to searches conducted after and no longer incident to a lawful arrest: "the search of an auto on probable cause proceeds on a theory wholly different from that justifying the search incident to an arrest." 399 U.S. at 49. Since there was no probable cause to believe that the auto contained stolen goods, this case gives the court a chance to define some of the

fuzzy borders between CHAMBERS v. MARONEY 399 U.S. 42 and ARKANSAS v. SANDERS 442 U.S. 753 while reaffirming the search incident to arrest doctrine PRESTON v. UNITED STATES 376 U.S. 364

(E)

The final exception to the requirement for a warrant hinted at in the trial court by the State was that the search of the automobile in the police parking lot by the officers investigating the burglary was justified as an "inventory." (R.P. 85) This court's decision in SOUTH DAKOTA v. OPPERMAN 428 U.S. 364 should not be extended to justify the present search. That case upheld a routine inventory of the contents of a car impounded for parking violations. Dicta in the case also suggests that routine inventories of

cars seized as part of forfeiture proceedings may be lawfully undertaken to protect the car while in police custody. Mr. Justice Powell's concurring opinion in SOUTH DAKOTA v. OPPERMAN clarifies the distinction between searches intended to be part of criminal investigations and routine applications of the policy that all vehicles impounded or seized in forfeiture proceedings be inventoried. Warrants in criminal investigations place a neutral magistrate between the citizens expectation of privacy and the police desire to find evidence; inventory searches occur when the police are not looking for evidence but are only following a caretaking routine and are not exercising any judgment to justify the search

428 U.S. at 383. In the present case the search of the car in the police parking lot was a part of the ongoing criminal investigation. Detective Keim, in charge of this burglary investigation, stood by the car with the incident report from the home invasion in hand, while Lt. Kemp read the serial numbers of stereo equipment to the detective so that he could compare the numbers on the equipment in the car with the serial numbers of the stereo equipment taken from the house. Calling the search an "inventory" cannot hide the fact that its purpose was a search for evidence of a crime. The state failed to prove that there was anything routine about this search. The court should grant Certiorari to clarify the limits of SOUTH DAKOTA v.

OPPERMAN 438 U.S. 364.

II

White against Black - ugly racial hostility permeated the trial. White victims testified against unidentified Blacks invading their homes at night. An all White jury convicted the Black defendant and the White Judge sentenced him to 20 years.

Perhaps a jury with some students and some Blacks would have responded to the racial overtones of the trial with more sophistication and balance.

In TAYLOR v. LOUISIANA 419 U.S. 522 (1975) and DUREN v. MISSOURI 439 U.S. 357 (1979) this court explained that the 6th and 14th Amendments require that juries must be drawn from a source fairly representative of the community:

> "jury wheels pools of names, panels or venires which juries are drawn must not sys-

tematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof." 419 U.S. at 538 quoted at 439 U.S. at 363-364.

DUREN v. MISSOURI explained:

"In order to establish a prima facie violation of the fair cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and rea-

> sonable in relation to the number of such persons in the community and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

This court has not decided but ought to decide whether students are a distinctive group in the community for Sixth Amendment purposes. In ANDERSON v. CASSCLES 531 F2d 682 (2nd Cir. 1976) the U.S. Court of Appeals relied on two New York State Court decisions and held that "the exclusion of students over the age of twenty one, . . ., would pose a substantial constitutional question which is not foreclosed by previous decisions of

this court." 531 F2d at 686. The Court of Appeals for the Seventh Circuit in UNITED STATES v. DELLINGER 472 F2d 340 (7th cir. 1972) observed: "We view the underrepresentation on voter lists of younger residents, and thus of any relevant attitudes which may be more prevalent among younger than older residents as a reason why it is desirable to seek feasible ways to supplement the voter list (for Jury Selection) . . . " 472 F2d at 366. Courts in New York have held that students are a distinctive group in the community for Sixth Amendment purposes PEOPLE v. MARR 67 Misc. 2d 113, 324 NYS 2d 608 (1971); PEOPLE v. ATTICA BROTHERS 79 Misc. 2d 492, 359 NYS 2d 699 (1974).

At trial the Petitioner's counsel challenged the array on the grounds that the entire jury list on its face showed a complete absence of any college students (R.P. 99-100). In the college town of Bloomington-Normal, the home of a major State University (ISU), the complete absence of students shows underrepresentation. The verified post-trial motion showed that Bloomington-Normal had a population of 71,000 and that Illinois State University had an enrollment of 17,000 to 20,000 students: a group comprising 20% of the town population was not represented.

The use of voter lists in selecting jurors is required by Ill. Rev. St. at ch78§1. When the board selecting jury lists knows of student

enrollment lists but chooses to use the voter lists with the underrepresentation that the voter list contains, the exclusion of students becomes intentional and the Statute is unconstitutional as applied to rural counties with large college populations.

The exclusion of students becomes even more important when the racial composition of the student body differs from the rest of the county.

The Appellate Court held that it was under no duty to consider the violation of defendant's 6th and 14th Amendment Rights because the motion and offer of proof were oral rather than written. In HENRY v. MISSISSIPPI 379 U.S. 443 13 L.Ed 2d 408, 855 S.Ct.564 (1965) this court held that a litigant's procedural defaults in State proceedings

do not preclude vindication of his federal rights unless the State's insistence in compliance with its procedural rules serves a legitimate State interest. When the substance of the defendant's challenge was presented to the trial court orally as soon as defense counsel saw the jury list showing the absence of students from the pool from which the jury was to be drawn, there was NO legitimate State interest to be served by making the defendant write his motion or present a written affidavit. The requirement for a sworn statement supporting the motion would have been satisfied in substance by permitting defense counsel to call the Clerk of the Court as a witness. The substance of defendant's position was presented in a timely fashion. Requiring a written motion exhalts useless form over vital constitutional rights

to a jury trial.

For the foregoing reasons, the Petitioner asks the Court to grant Certiorari and review the judgment of the Supreme Court of Illinois.

Respectfully submitted,

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APPENDIX I

COPY OF THE ORDER OF THE
SUPREME COURT OF ILLINOIS

(Letterhead of)

ILLINOIS SUPREME COURT
Clell L. Woods, Clerk
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217) 782-2035

September 29, 1980

No. 53327 - People State of Illinois, respondent, vs. Dennis Perry, Jr., petitioner. Leave to appeal, Appellate Court, Fourth District.

The Supreme Court today denied the petition for leave to appeal in the above entitled cause.

Very truly yours,
/s/ Clell L. Woods
Clerk of the Supreme Court

APPENDIX IIA - COPY OF THE OPINION OF ILLINOIS APPELLATE COURT

401 N.E. 2d 1263
81 Ill.App. 3d 422
37 Ill. Dec. 170

THE PEOPLE OF THE STATE OF ILLINOIS
Plaintiff-Appellee,
v.
DENNIS PERRY,JR., Defendant-Appellate
No. 15722

Appellate Court of Illinois,
Fourth District.

Feb. 29, 1980.

MILLS, Presiding Justice:

CHARGES: Armed robbery, home invasion, burglary, and felony theft.

JURY: Guilty

JUDGE: 20 years, concurrent.

THIS COURT: Affirm.

A jury trial resulted in defendant's convictions for three counts of armed robbery, one count each of home invasion, burglary, and felony theft. He was sentenced to 20 years for each armed robbery charge,

20 years for home invasion, 7 years for burglary, and 5 years for the theft - all to run concurrently. He raises eight issues on appeal.

But first, a brief review of the facts.

The incident in question occurred in the early morning hours of December 18, 1978, at a residence at 216 South Coolidge in Normal, Illinois. Three of the five occupants were in the home asleep at 1:20 a.m. when the doorbell rang. One of the residents, Ronald Sobkoviak, answered the call and encountered a thin black man, who asked for "Dan."

Daniel Flick was summoned, at which time the black man and several others forcibly entered the dwelling. In the next 15 to 20 minutes, the res-

idents were threatened, beaten, cut, held at gunpoint, and robbed. Due to the lighting conditions, the residents were unable to identify the perpetrators but they were able to tell that one wore an Army fatigue jacket and that three different types of shoes were worn: blue tennis shoes with white stripes, hiking boots, and black dress shoes. A number of items which were taken by the intruders were identified at trial, including a Pioneer stereo amplifier and an Illinois State University class ring bearing the inscription "Greg Burmeister."

Martin Belz, the next-door neighbor of the victims, upon hearing of the event, informed police that he had seen a black over light yellow Buick equipped with amber colored lenses over the brights, and an object hanging from the rearview

mirror. The automobile was outside his residence at the time of the offense.

This vehicle was spotted by an Illinois State University police officer at 4:24 p.m. outside the Waterson Towers dormitory. The officer observed four men loading items into the auto. As the auto left, it was stopped by ISU and Normal police officers. The defendant was the driver of the auto and the Pioneer stereo amplifier was seen on the front seat. After defendant consented, the officers searched his dorm room and found the class ring. They also recovered an Army fatigue jacket and a pair of blue tennis shoes with white stripes. At trial, defendant stated that he had spent the entire evening in question with his

girlfriend, Pamela Pharms, in her dorm room. He stated that he purchased the amplifier and ring from a man named "Bob" in a parking lot for $60. He borrowed the automobile from a friend to use while moving between dormitories.

1. REASONABLE DOUBT

The defendant initially submits that in light of the fact that all of the evidence of guilt was circumstantial and the fact that there existed unrefuted alibi evidence, he was not proved guilty beyond a reasonable doubt. Defendant cites a number of cases wherein the appellate court has reversed convictions due to failure to prove guilt beyond a reasonable doubt. PEOPLE v. MOORE (1973), 12 Ill.App.3d 78, 298 N.E.2d 202; PEOPLE v. CLAUDIO (1971), 3 Ill.App.3d 309,279 N.E.2d 39; PEOPLE v. ADAMS (1969), 115 Ill. App.2d 360,253 N.E.2d 23.

We are not persuaded.

[1,2] To support a conviction upon circumstantial evidence, it is only necessary that the proof of circumstances be of such a conclusive nature and tendency as to lead on the whole, to a satisfactory conclusion and to produce a reasonable and moral certainty that the accused, and no one else, committed the crime. (PEOPLE v. MARINO (1970), 44 Ill2d 562, 256 N.E.2d 770.) It is essential that the facts proved be not only consistent with defendant's guilt but also inconsistent with any reasonable hypothesis of innocence. The State is not, however, required to establish guilt beyond the possibility of a doubt.

PEOPLE v. BRANION (1970), 47 Ill.2d 70,77,265 N.E.2d 1,5 Cert. Denied (1971), 403 U.S. 907, 91 S.Ct. 2213, 29 L.Ed. 2d 683.

[3] In the instant case, the defendant was the operator of an automobile which matched the description of the one at the scene. He possessed blue tennis shoes with white stripes and a green Army fatigue jacket - both no different from those worn by the perpetrators. Finally - the most incriminating circumstance - he was in possession of the spoils of the offense. Recent, exclusive, and unexplained possession of stolen items may give rise to an inference of burglary and armed robbery, and is sufficient to sustain the conviction unless overcome by facts or circumstances which create a reasonable

doubt. PEOPLE v. FRANCESCHINI (1960), 20 Ill.2d 126, 169 N.E.2d 244; PEOPLE v. BULLOCK (1977), 51 Ill.App.3d 149,9 Ill.Dec. 218, 366 N.E.2d 475.

[4] Defendant strenously points to the unrefuted alibi evidence. As noted above, defendant testified that he spent the entire evening with Pamela Pharms. Pharms corroborated this statement and another resident of the floor, Tina Holmes, stated that she saw the defendant on the dorm floor on the night in question. The State offered no evidence to refute this testimony. The jury was not, however, required to believe the alibi evidence, even though it was unrefuted. PEOPLE v. GRICE (1978) 60 Ill.App. 3d 7, 17 Ill.Dec. 284, 376 N.E.2d 283.

We further note that there were sufficient questions raised so as to discredit the corroboration of defendant's alibi. Holmes stated that she saw defendant between 7 p.m. and 12 p.m. on the night of December 17, 1978. She stated that she did not see defendant enter Pharms' room and that she would not have known if defendant had left the floor. Since the instant offense was committed sometime after 1 a.m., the testimony of Holmes was of little probative value.

The credibility of Pharms was also questioned. Pharms stated that she did not know whether she loved defendant or whether she hoped to marry him. The prosecution then introduced a copy of the letter Pharms

had written in 1978 stating that she loved defendant and hoped to marry him. Clearly she was not a disinterested witness.

[5] Under the facts and circumstances of this case, the jury could have properly determined that defendant was guilty beyond a reasonable doubt, and we will not substitute our judgment for that of the jury.

II. NEWLY DISCOVERED EVIDENCE

Defendant made a motion for a new trial which was accompanied by an affidavit signed by Kevin Marshall, stating that he was a witness to the transaction between defendant and the man named "Bob." The affidavit stated that he did not come forth earlier because he was afraid of retaliation from "Bob." Since the

time of trial, Marshall had learned that "Bob" had been killed in Chicago.

[6] To award a new trial in the basis of newly discovered evidence, the new evidence must be of such a nature that it would probably change the result on retrial; must be material to the issue and not merely cumulative; and must be of such a nature that it could not have been discovered prior to trial by the exercise of due dilligence. PEOPLE v. TORRES (1977), 47 Ill.App.3d 101, 5 Ill.Dec. 480, 361 N.E.2d 803.

[7] Of the above requirements, one of these has not been met: Defendant has not shown due diligence in obtaining Marshall's testimony. At trial, defendant stated that there were a number of other people

who had observed the transaction with "Bob." He had seen these people around but did not know them personally. Defendant, when asked if he had ever tried to locate the other individuals, replied negatively.

The trial court correctly denied the motion for a new trial.

III CROSS-EXAMINATION - PRIOR CONVICTIONS

On direct examination, defense counsel asked the defendant about his prior convictions for forgery.

"Q. And could you tell us, please, what, if any, problems you had last year with the law?

A. I wrote two bad checks, one for $14 and one for $41.

Q. And what happened after

that?

A. I pleaded guilty to it.

Q. To what offense, please?

A. To forgery.

Q. And did you contest those charges?

A. No, I didn't.

Q. What is your plea in this case, Mr. Perry?

A. Not guilty."

On cross-examination, the trial court allowed the State, over defendant's objection, to elicit from defendant that his guilty plea was pursuant to a plea agreement. Defendant now claims that this constitutes reversible error.

[8] While proof of a prior conviction offered to discredit the testimony of the accused may only be done by introduction of a prior record and not

cross-examination (PEOPLE v. DONALDSON (1956), 8 Ill.2d 510, 134 N.E.2d 776), the prosecution's examination in this case was not improper.

[9] As noted above, the fact of a prior conviction was brought out on direct examination by defense counsel. Additionally, the manner of questioning employed on direct examination indicates that defense counsel was trying to infer innocence on the present charges by the fact that defendant had pleaded guilty to other charges. This was highly improper (See PEOPLE v. BELVEDERE (1979), 72 Ill.App.3d 998,28 Ill.Dec. 649, 390 N.E.2d 1239), and the State's Attorney was entitled to refute this inference by establishing the plea agreement.

IV. JURY ARRAY

Defendant, relying upon the Supreme Court's decision in TAYLOR v. LOUISIANA (1975), 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690, and DUREN v. MISSOURI (1979), 439 U.S. 357, 99 S.Ct. 664, 58 L.Ed.2d 579, also argues that the trial court erred in refusing a hearing on defendant's challenge to the array of prospective jurors from which Illinois State University students had been excluded.

In TAYLOR, the court held unconstitutional a Louisiana statute which provided that women were not selected for jury duty unless they previously filed a written declaration of their desire to serve. In DUREN, the court struck down a Missouri statute which provided an automatic exemption from jury service

for any woman requesting not to serve.

[10] Defense counsel, in the instant case, made an ORAL challenge to the jury array. The trial court denied the motion, noting that the motion must be presented in WRITTEN form and accompanied by supporting affidavits.

The trial court correctly stated the law and was under no duty to conduct a hearing on defendant's oral motion. Ill Rev.Stat. 1977, ch. 38, par. 114-3(b); PEOPLE v. HUGHES (1977), 46 Ill.App.3d 490, 4 Ill Dec. 930, 360 N.E.2d 1363.

V. REBUTTAL

Defendant claims that reversible error occurred during the State's rebuttal to defendant's case.

We disagree.

[11] Prior to trial, defendant informed the police that he had bought the ring and amplifier from a guy named "Bob" who entered Building A of Hillside Apartments. At trial, however, defendant stated that "Bob" entered Building E. On rebuttal, the State called the officer to whom the previous statement had been given. Robert Thicklen was also called to testify that he lived in Building A and that he did not sell the stereo equipment to defendant. On surrebuttal, defendant testified that Thicklen was not the "Bob" who had sold him the amplifier.

Defendant claims that the State's use of Thicklen's testimony was reversible error. The error in allowing the testimony was one of relevancy.

Thicklen's testimony did not contradict any evidence presented on defendant's case and therefore was not proper rebuttal. The only effect which Thicklen's testimony could have had was to establish that defendant's prior statement to the police was incorrect.

While it was error to allow Thicklen's testimony, an examination of the record - especially in light of defendant's testimony on direct examination and on surrebuttal - reveals that Thicklen's testimony was virtually devoid of probative value. Clearly the error was harmless in this cause.

VI. MOTION TO SUPPRESS

Defendant also claims that it was error for the trial court to deny his motion to suppress evidence found in the automobile and in his dormitory room

as fruits of an illegal arrest. (Both searches and the arrest were made without warrants.)

[12,13] A person may be arrested without a warrant when probable cause exists to do so. Probable cause exists when the facts and circumstances within the arresting officer's knowledge are sufficient to warrant a man of reasonable caution in believing that an offense has been committed and that the person arrested has committed the offense. The police need not have evidence against the defendant sufficient to sustain conviction. (PEOPLE v. ROBINSON (1976), 62 Ill.2d 273,342 N.E.2d 356.) Whether or not probable cause for an arrest exists in a particular case depends upon the totality of the facts and circumstances known to the officers at the

time of the arrest. PEOPLE v. CLAY (1973), 55 Il12d 501,304 N.E.2d 280.

[14] In the instant case, the officers had received a report from Belz stating that a black over yellow Buick with amber headlights and a decoration hanging from the rearview mirror blocked the driveway next to 216 South Coolidge at the approximate time of the offense. Fifteen hours later, a car fitting the description was seen parked on the south side of an ISU dormitory. An officer observed three young men loading items into the automobile. Under the facts of this case, the trial court's conclusion that probable cause existed was not manifestly erroneous. CLAY.

[15] Defendant also contends that probable cause was lacking because the police did not take actions to verify

the statements made by Belz or to check his reliability. We note that in this case the informant was a private citizen and not a paid professional. As such, the officers were justified in relying upon his information without independent verification or examination of his reliability. See PEOPLE v. HOFFMAN (1970), 45 Ill.2d 221, 258 NE2d 326, cert. denied (1970), 400 U.S. 904, 91 S.Ct. 142, 27 L.Ed.2d 141; PEOPLE v. FISHER (1979), 76 Ill.App. 3d, 331, 32 Ill.Dec. 107, 395 N.E.2d 54.

VII. INTRODUCTION OF EXHIBITS

Defendant next argues that the introduction of 25 items of burglary proceeds which had not been connected to defendant was error and that cer-

tain other items - defendant's shoes, jacket, knife, and gun grip - were irrelevant and should have been excluded.

[16-19] Evidence is admissible where it fairly tends to prove the offense charged and any circumstances may be put in evidence which tend to make the proposition at issue more or less probable. Physical evidence may be introduced where there is proof to connect the evidence to defendant and the crime. (PEOPLE v. FAIR (1977), 45 Ill.App.3d 301, 4 Ill. Dec. 15, 359 N.E.2d 848.) Admissibility does not require a showing that the evidence was actually used in the offense charged as long as it is shown that the object is at least suitable for the commission of the crime.

(PEOPLE v. MEEKS (1978), 59 Ill.App. 3d 521, 16 Ill.Dec. 844, 375 N.E.2d 1001.) The propriety of receiving demonstrative evidence rests primarily within the discretion of the trial judge and the exercise of that discretion will not be interfered with absent an abuse which prejudices the defendant. FAIR.

[20] It was not error to allow the introduction of defendant's shoes, jacket, knife, and gun grip. The victims of the offenses stated that the shoes and jacket, while not having any distinguishing characteristics, were in no way different from those worn by the perpetrator. Additionally, there is no question that the perpetrators were armed with at least one gun and one knife. The

common nature of these items affects the amount of weight given to the fact that they were found in defendant's possession but does not make them inadmissible.

[21] Likewise, we do not agree that the admission of items not found on defendant constituted reversible error. At trial the jury was not told where the prosecution obtained these items. The defendant on direct examination denied ever seeing the items. Under the facts of this case, defendant has not shown any prejudice due to the admission of this physical evidence. PEOPLE v. HOUCK (1977), 50 Ill.App.3d 274, 8 Ill. Dec. 338, 365 N.E.2d 576.

VIII. CONSTITUTIONALITY OF CLASS X LEGISLATION

[22] Finally, defendant asserts that Class X legislation (Public Act 80-1099, effective February 1, 1978) is unconstitutional. It is claimed that by making all sentences determinative, eliminating the prison review board's discretion in granting parole release and by requiring minimum mandatory sentences, the legislature has effectively abandoned rehabilitation as an objective of sentencing. Defendant notes that article I, section 11, of the Illinois Constitution of 1970 provides that all penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender

to useful citizenship.

The fallacy of defendant's position is that it is based on the assumption that early release and parole are the only means of rehabilitation. This is a position we are not prepared to espouse. The methods of rehabilitating the criminal offender have been the subject of considerable, diverse discussion. We feel that this is a question peculiarly suitable for legislative investigation, analysis, and action. We do not feel that Public Act 80-1099 has abandoned the concept of rehabilitation.

Affirmed.

CRAVEN and WEBBER, JJ., concur

COPIES OF THE OPINIONS,
ORDERS AND FINDINGS
OF THE CIRCUIT COURT OF
MCLEAN COUNTY, ILLINOIS

Rulings on Motion to Suppress

THE COURT: Well, this of course, is a matter of a Motion to Suppress evidence because it was seized illegally. First of all in connection with Mr. Belz, the Court finds that the circumstances in connection with his observations that he made and from where they were made, give rise to the inference that Mr. Belz is a private citizen and as such, presumse to be reliable in communicating information to the police in circumstances such as this. Court further finds that the information which originated with Mr. Belz was relayed among the various police officers of the department of the I.S.U. Police Department and the Normal

Police Department, disseminated to various units of those police departments and among those who received the information were the officers who testified here today; from the information that officer knew because of that, from the observations that were made by the officers which observations indicated that the automobile which was sighted by the I.S.U. police officer who testified, matched the description of the automobile in which was used in the incident, and from the observation of the officer of the individuals loading articles and items into the automobile, the Court finds there is probable cause to believe that the contents of the automobile seized and further that the search of the automobile was made at the premises or at

the time of the stopping of the automobile and later at the police department was incident to a lawful arrest. In connection with the search of the defendant's room, the Court finds that there was a voluntary, willing consent given by the defendant to the police officer for the search, and though no promise was made to the defendant to the consent that he gave, therefore, it is the opinion of the Court that the Motion to Suppress the evidence should not be allowed. The Court will deny the Motion to Suppress.

RULING ON CHALLENGE OF THE ARRAY

THE COURT: Well, this motion is now made orally, and it is the Court's understanding such a motion is appropriately made in writing supported by an affidavit and burden of proof. With regards to the challenge to the array upon the motion, I believe it can be concluded upon examination of the list of prospective jurors whether or not there are any students from the university who make up a part of the particular group of prospective jurors, and whether in any event that would be a proper challenge to the array.

RULING ON DEFENDANT'S POST TRIAL MOTION

THE COURT: Thank you. Gentlemen, the Court has previously to the hearing today, reviewed the Motion for a New Trial that was filed a number of days ago. So the Court has had an opportunity to review that, and the Court has now received and considered the Affidavit submitted today by the Defense Counsel, and now had the benefits of the argument and suggestions of counsel. I think the Court is prepared to rule on the Motion for New Trial.

First of all in regard to the matter of the newly discovered evidence and the situation as to a possible change in the result or outcome of the trial. The main thrust of the Defense in this case was, of course, alibi; that being that

the defendant was with a young lady at the time of the incident. That aspect of the Defense, the alibi which was provided by the defendant's testimony also supported by other witnesses and apparently was rejected by the jury. In regard to the matter of the diligence is essentially correct and that due diligence has not been demonstrated in regard to the propcsed new evidence.

The Motion refers to a number of other matters, rulings on motions by the Court before and during the trial. It also refers to various evidentiary rulings made by the Court during the trial. The Court is of the opinion that the rulings on those matters by the Court were correct. The other matters referred

to in the motion including the unconstitutional nature of the Statute or home invasion, the Court feels are not well taken. And the Court is of the opinion that there was sufficient evidence to warrant the conviction in this case, and that the defendant was proven guilty beyond a reasonable doubt.

Therefore, it is the Court's opinion that the Motion for New Trial should not be allowed, and the Court will, therefore, deny the Motion for New Trial.

OVERRULE OF OBJECTION TO THE ADMISSIONS OF ILLINOIS SEIZURE EVIDENCE

MR. STEVENS: Number 3, I will only renew my Motion to Suppress objection, which I am not waiving.

THE COURT: That is the amplifier, right. I will admit that.

APPENDIX III

The Order of the Supreme Court as Quoted in its Entirety in Item I of the Appendix (page A1 of Appendix).